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Before the
Federal Communications Commission
Washington, D.C. 20554

AUG 16 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Parts 21 and 74 of)
the Commission's Rules With Regard) MM Docket No. 94-131
to Filing Procedures in the)
Multipoint Distribution Service)
and in the Instructional Tele-) DOCKET FILE COPY ORIGINAL
vision Fixed Service)
)
and)
)
Implementation of Section 309(j)) PP Docket No. 93-523²⁵³/₅₂₃
of the Communications Act -)
Competitive Bidding)

PETITION FOR RECONSIDERATION AND CLARIFICATION

Network for Instructional TV, Inc. ("NITV"), pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider and as necessary clarify certain of the rules and policies adopted in the Report and Order in the above-referenced proceeding ("MDS Auction Order").

Introduction

NITV was established in 1979 as a nonprofit education corporation by the late John Curtis, a noted and respected pioneer in distance learning applications. NITV recognized that technology -- used effectively -- could assist educators in impacting positive change in the nation's public, private, and technical schools. With its primary focus on America's underserved youth in grades kindergarten through twelve (K-12), NITV began by building Instructional Television Fixed Service ("ITFS") systems, giving

local educators the opportunity to provide increased learning services. These systems were built with the help of numerous wireless cable operators with which NITV leases excess airtime. As a result, today more than 500,000 youth in over 1000 classrooms in cities across the nation benefit from services that are provided through more than 70 ITFS channels licensed to NITV.

Working with outstanding public and private school educators, NITV assists in determining learning needs at the community level and helps local educators acquire or develop appropriate television-delivered programming from a variety of sources for use in subject areas that are suitably addressed through the television medium. NITV is unique in that it does not dictate a fixed program service over its distribution system. Rather, NITV maintains a strong commitment to the concept of allowing each school system in the network to control its own program choices to meet the needs of its particular community.

NITV is supportive of the Commission's efforts to promote wireless cable as an effective competitor. It is gravely concerned however, that some of the new rules and policies adopted pursuant to the MDS Auction Order will have a detrimental effect on the ability of ITFS licensees and applicants to take full advantage of the benefits of leasing excess airtime to wireless cable operators that flow to ITFS licensees and educators such as NITV.

The Right Of First Refusal Must Be Eliminated

Of utmost concern to NITV is the statement that "... ITFS station licensees and prospective ITFS applicants that seek to construct and operate new ITFS facilities located within a BTA [Basic Trading Area] and that choose to lease excess channel capacity will be free to negotiate with any potential lessee, including the holder of the BTA, [and] the holder of the BTA will be afforded the right to match the final offer of any proposed lessee". MDS Auction Order at ¶41. Nothing in the NPRM¹ even hinted at the possibility that the Commission would give the BTA winner such rights. Moreover, such a policy is fundamentally at odds with a licensee's fiduciary duty as a public trustee to carefully select and evaluate prospective lessees.

Pursuant to Section 553(b)(3) of the Administrative Procedure Act ("APA"), the Commission must publish a notice of proposed new rules in the Federal Register, which notice must include "either the terms or substance of the proposed rule or description of the subjects and issues involved." 5 USC § 553(B)(3) (1982). No such notice was given. Nor can it be claimed that the final rule is a "logical outgrowth" of the one proposed. See Horsehead Resources

¹ See Notice of Proposed Rulemaking, Amendment of Parts 21 and 74 of the Commission's Rules With Regard to the Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 7665 (1994) (hereinafter referred to as "NPRM").

Defense Counsel v. E.P.A., 824 F. 2d 1258 at 1284 (1st cir. 1987); citing BASE Wyandotte Corp. v. Costel, 444 U.S. 1096, 100 S. Ct. 1063, 62 L. Ed. 2d 784 (1980). To the contrary, the NPRM specifically stated that "[t]he only aspect of this proceeding which we propose to apply to ITFS is the electronic filing proposal." NPRM at 7666. The right of first refusal is thus hopelessly and legally deficient.

Moreover, the right of first refusal furthers no policy of the Commission and will likely -- contrary to the goals of the Commission -- undermine a wireless cable operator's ability to aggregate sufficient channel capacity to compete effectively by balkanizing channels among the incumbent operator and the BTA winner. To the extent a wireless operator's ability to compete is undermined, so too are the potential revenues and other benefits, including system technical and operational support, that flow to ITFS licensees leasing excess airtime to an operator.

Significantly, a right of first refusal given to a third party BTA-winner will inevitably handicap the ability of the encumbered ITFS licensee to negotiate the best possible deal because in practical terms, the incentive of a party to go to the time and expense of negotiating a lease that it knows could be matched by another is minimized. In addition, the BTA winner has no incentive to negotiate in a competitive environment since its efforts will only likely end in bidding-up the consideration paid to the ITFS

licensee. This perverse result is certain to follow if the Commission fails to eliminate the right of first refusal.

Fundamentally, the imposition of a right of first refusal in favor of a BTA-winner violates Constitutional protections guaranteeing freedom to contract. See West Coast Hotel Co. v. Parrish, 300 US 379, 392 (1937). The Commission appears to believe that wireless cable operators are fungible. This is not the case. In discharging its fiduciary duty as a public trustee, NITV looks not only to whether the terms of the airtime agreement are acceptable but also to the character, financial capability and experience of the operator. The Commission is well aware that the wireless industry has been plagued by speculative and insincere operators. NITV simply cannot cede its ability to choose which operator it enters into a relationship with on the promise that a BTA winner will best serve its long-term interests simply because the BTA winner was willing to pay the U. S. Treasury the most money.²

**ITFS Interference Protection Rights Must Be
Modified And Clarified**

The Commission's Order granting BTA-wide protected service

² Some question is also raised as to whether the Commission intended to preempt the laws of some states that subject prospective ITFS lessors to state or local approval process or competitive bidding procedures before an excess airtime agreement is effective or enforceable.

areas ("PSA") has the potential to undermine the ability of educators to initiate new service and improve existing service on ITFS channels. See MDS Auction Order at ¶41. The new rules will require prospective ITFS applicants to demonstrate interference protection to the BTA-wide PSA for applications for channel D4 and the G-Group because these channels are adjacent to MDS channels. In addition, where the BTA winner is eligible to apply for commercial ITFS channels (up to 8), the BTA Winner is given a BTA-wide PSA for those channels as well. The preclusive effect for the establishment of new ITFS facilities thus would be far-reaching. This effect can be ameliorated by simply affording a 35-mile radius PSA for commercial ITFS and MDS stations actually applied for and authorized to the BTA winner.

Although new section 21.938(b) requires BTA winners and MDS licensees and applicants to demonstrate interference protection to licensed receive sites or PSAs of ITFS stations, new Section 21.938(c) does not require those interests to correct any instances of harmful interference to ITFS stations. The Commission should take this opportunity to clarify that incumbent ITFS licensees will be entitled to interference protection in the same manner as incumbent MDS licensees.

Conclusion

Reconsideration of the MDS Auction Order to eliminate the right of first refusal to match ITFS airtime agreements given to the BTA winner and to modify and clarify the interference protection rights afforded to ITFS licensees is critical to ensuring that ITFS remains a viable means to deliver much-needed distance education services.

Respectfully submitted,

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